

4 November 2023

To the Honorable Justices of the Supreme Court of Nepal:

We are law professors who specialize in human rights, gender, and comparative constitutional law. We are grateful to the Supreme Court of Nepal for the opportunity to submit this expert opinion report (30 pages) and hope it will assist the Court in resolving the case of *Rukshana Kapali v. Government of Nepal et al.* (Writ Petition No. 077-WO-0973).

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\* See, e.g., Holning Lau, "Courts, the Law, and LGBT Rights in Asia," in Don Haider-Markel (ed.), *Oxford Encyclopedia of LGBT Politics and Policy* (Oxford University Press 2021); Holning Lau, "Gender Recognition as a Human Right," in Andreas von Arnould, Kerstin von Decker & Mart Susi (eds.), *Cambridge Handbook on New Human Rights: Recognition, Novelty, Rhetoric* (Cambridge University Press 2019); Holning Lau, "Sexual Orientation and Gender Identity Discrimination" (2018) 2(2) *Comparative Discrimination Law* 1.

\*\* See, e.g., Mara Malagodi, "Gender, Sexuality, and Constitutionalism in Nepal," in Wen-Chen Chang, Kelley Loper, Mara Malagodi & Ruth Rubio-Marín (eds.), *Gender, Sexuality, and Constitutionalism in Asia* (Hart Publishing, forthcoming); Mara Malagodi, "Intersectional Inequalities and Reproductive Rights: An India-Nepal Comparison" (2020) 3 *University of Oxford Human Rights Hub Journal* 195; Mara Malagodi, "Challenges and Opportunities of Gender Equality Litigation in Nepal," (2018) 16 *International Journal of Constitutional Law* 527.

## SUMMARY OF ARGUMENT

In the 2007 case of *Sunil Babu Pant v. Government of Nepal*, this Court recognized that an individual's fundamental rights encompass the right to change one's legal gender based on "self-feelings" and "self-determination" as opposed to medical or other criteria.<sup>1</sup> This Court's focus on self-determination was momentous not only for Nepal but also for the world. At the time, no other national apex court or national government had so clearly prioritized self-determination as the guiding principle for resolving matters concerning gender identity.

The *Pant* opinion's discussion on gender identity centered on the rights of third-gender individuals, in other words persons who identify outside the man/woman binary. Yet the principle of self-determination embraced by this Court applies with equal force to binary transgender individuals, including petitioner Rukshana Kapali. In this expert opinion report, we use the phrase "binary transgender" to refer to individuals who were assigned male at birth but identify as women as well as individuals who were assigned female at birth but identify as men. We respectfully urge this Court to respect binary transgender persons' right to self-determination of legal gender. Pursuant to this right, the state is obligated to furnish binary transgender persons with identity documents that reflect their self-identification as a man or woman as opposed to assigning them to a third-gender category. Such identity documents include but are not limited to citizenship certificates, passports, and voter identification cards.

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<sup>1</sup> *Sunil Babu Pant v. Government of Nepal*, NKP 2065 (2007) Vol. 50, No. 4, translated in *Sunil Babu Pant and Others v. Nepal Government and Others [Decision on the Rights of Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) People]*, 2 NJA L.J. 262, 280, 285 (2008).

We had originally prepared an expert opinion report for Ms. Kapali’s hearing scheduled for 4 July 2022. When that hearing was postponed, we decided to turn our report into a journal article. Our article is forthcoming in the January 2024 issue of the *University of Pennsylvania Journal of International Law* (vol. 45, issue 2), and we have attached our article manuscript as the main component of this report.<sup>2</sup> Our article explains that, in the years since *Pant* was decided, a rapidly growing number of countries and supranational legal institutions have taken steps to protect the right to self-determination of legal gender, including that of binary transgender persons. Our article charts this trajectory of change around the world and explains that the trajectory is underpinned by compelling human rights principles. This analysis suggests that comparative law—along with Nepal’s constitutional law and international obligations—strongly supports Ms. Kapali’s claim to gender self-determination on identity documents.

Although this Court's decision in *Pant* positioned Nepal at the forefront of nations respecting gender self-determination, other countries have since surpassed Nepal by protecting the gender self-determination of binary as well as non-binary individuals. Ms. Kapali's case presents this Court with the opportunity to reposition Nepal so that Nepal stands once again among countries leading in the protection of gender identity rights. The principle of self-determination that this Court embraced in *Pant* is not fully realized unless the self-determination of binary transgender persons is respected.

<sup>2</sup> Our article manuscript is also available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4429064](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4429064).

LEGAL GENDER RECOGNITION IN NEPAL  
AND COMPARATIVE CONTEXTHolning Lau<sup>†</sup>  
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*The Supreme Court of Nepal was a groundbreaker when it ruled in Pant v. Nepal (2007) that people have the right to change their gender on identity documents based on “self-feelings” and “self-determination” as opposed to medical or other criteria. At the time, no other national apex court or national government had so clearly prioritized self-determination as the guiding principle for resolving matters concerning gender identity. The decision in Pant, however, focused on people of “third gender,” in other words people who identify as neither male nor female. Now, the Supreme Court of Nepal is considering the case of a transgender woman, Ms. Kapali, who is seeking to identify as female on her identity documents, not as “third gender” or “other.” Ms. Kapali is challenging government authorities that have rejected her requests.*

*This Article analyzes Ms. Kapali’s claim from the vantage point of comparative law. In the years since Pant was decided, a rapidly growing number of countries and supranational legal institutions have taken steps to protect individuals’ self-determination of legal gender, including that of individuals who wish to change their legal gender from male to female or vice versa. We chart this trajectory of change around the world and explain that the trajectory is underpinned by compelling human rights principles. This analysis suggests that comparative law—along with Nepal’s constitutional law and international obligations—strongly supports Ms. Kapali’s claim to gender self-determination on identity documents. Numerous countries have surpassed Nepal in protecting gender identity rights, but Ms. Kapali’s case presents an opportunity for the Supreme Court*

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*to position Nepal once again among the world’s leading jurisdictions on gender identity rights.*

*This Article helps to shape understandings about Ms. Kapali’s case, and it provides context for analyzing the Supreme Court’s forthcoming ruling. Although Ms. Kapali’s case in Nepal is the impetus for this Article’s comparative analysis, our discussion of comparative law is significant to other countries as well. Our article provides the most comprehensive study to date of gender self-determination laws around the world. It thus offers insights that are relevant not only to Nepal but also to other countries that are considering reforms to gender identification policies.*

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## INTRODUCTION

Rukshana Kapali viewed herself as a girl since a very young age, but she was assigned male when she was born in Lalitpur, Nepal, in 1999.<sup>1</sup> She has sought to obtain identity documents that reflect her gender as female, including a new citizenship certificate and a new education certificate (also known as a School Leaving Certificate), but authorities have refused these requests.<sup>2</sup> They informed Ms. Kapali that she may receive identity documents that mark her gender as “other” but not as female.<sup>3</sup> While some people in Nepal self-identify as neither male nor female, many other

<sup>1</sup> Petition to Supreme Court at 9, Rukshana Kapali v. Government of Nepal, No. 077-WO-0973 (Nov. 30, 2021) [hereinafter Kapali Petition to Supreme Court].

<sup>2</sup> *Id.* at 11–20.

<sup>3</sup> *Id.* Ms. Kapali reported in her petition that she was able to obtain a female gender marker on her first passport; however, after that passport expired, the next passport that she received included the marker “O” for “other.” *Id.* at 20–21.

transgender people in Nepal, including Ms. Kapali, reject being labeled as a “third gender” or “other.”<sup>4</sup> Without identity documents with female gender markers, Ms. Kapali has faced numerous life challenges such as difficulties enrolling in universities and obtaining travel visas. In 2021, Ms. Kapali filed a writ petition to the Supreme Court of Nepal arguing *inter alia* that state authorities violated her constitutional and human rights by barring her from self-identifying as female on her identity documents.<sup>5</sup>

As scholars whose research focuses on gender and comparative constitutional law in Asia,<sup>6</sup> the two of us served as expert witnesses in support of Ms. Kapali’s case.<sup>7</sup> We provided an expert opinion report addressed to the Supreme Court.<sup>8</sup> The report explained that Ms. Kapali’s right to self-identify as female on identity documents is not only required by Nepal’s own constitutional precedent; it is also supported by the trajectory

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<sup>4</sup> See Ankit Khadgi, *A Group of Activists Strives to End Forced Imposition of the Third Gender Label*, KATHMANDU POST (Jan. 6, 2021), <https://kathmandupost.com/art-culture/2020/10/22/a-group-of-activists-strives-to-end-forced-imposition-of-the-third-gender-label> [https://perma.cc/9C9Q-UTSZ].

<sup>5</sup> Kapali Petition to Supreme Court, *supra* note 1, at 11–21.

<sup>6</sup> See generally *id.*

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<sup>8</sup> We provided Ms. Kapali our report, dated May 10, 2022, for her to submit to the Supreme Court of Nepal in association with her hearing scheduled for July 4, 2022. That hearing has been postponed multiple times and is currently scheduled for November 6, 2023. The Supreme Court of Nepal does not make expert reports such as ours publicly available. Hence, we have written this Article to share our analysis with readers beyond the Supreme Court.

of law reforms around the world. A growing number of countries and supranational legal institutions have taken meaningful steps toward protecting self-determination of one's legal gender. This trajectory is compelling because it is firmly rooted in human rights principles.

Based on our analysis of Nepali constitutional law in comparative perspective, our report respectfully urged the Supreme Court to protect binary transgender persons' right to legal gender recognition based on self-determination (hereinafter referred to as the "right to legal gender recognition").<sup>9</sup> We use the phrase "binary transgender" to refer to individuals who were assigned male at birth but identify as women as well as individuals who were assigned female at birth but identify as men. Pursuant to this right to legal gender recognition, the state is obligated to furnish binary transgender persons with identity documents that reflect their self-identification as a man or woman as opposed to assigning them to a third gender category.<sup>10</sup> Such identity documents include but are not limited to citizenship certificates, education certificates, passports, and voter identification cards.<sup>11</sup>

This Article is an adaptation of our expert opinion report. We have taken our report, updated it, and edited it lightly to provide extra background information and make our writing accessible to audiences beyond the Supreme Court of Nepal. It may take a year or more before the Supreme

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<sup>9</sup> This Article uses the term "legal gender" to refer to the gender that is listed for a person in government registries and on state-issued identity documents. This Article uses the phrase "right to legal gender recognition" to refer to a person's right to have their self-determined gender appear in government registries and on identity documents whenever gender markers are included.

<sup>10</sup> Alternatively, the state may choose to completely remove gender markers from identity documents. The Netherlands has announced that it is pursuing this approach. *Dutch ID Cards to be Gender-Free Within Five Years to Avoid 'Unnecessary' Registration*, DUTCHNEWS.NL (July 7, 2020), <https://www.dutchnews.nl/news/2020/07/dutch-id-cards-to-be-gender-free-within-five-years> [<https://perma.cc/TY2X-G6H3>]. Cf. Ido Katri, *Transitions in Sex Reclassification Law*, 70 UCLA L. REV. (forthcoming) (arguing for the abolition of sex classification at birth).

<sup>11</sup> There may be exceptional contexts in which the state can justify identifying and categorizing people based on biological sex characteristics instead of self-identification. For example, a person's biological sex characteristics can sometimes influence their competitiveness in sports; governmental agencies may therefore have a legitimate interest in classifying people by biological sex characteristics for the purpose of certain athletic competitions. It is important to note that there are ways to address such concerns about sports without depriving transgender persons of the ability to self-identify their gender on documents such as citizenship certificates, passports, and voter identification cards. For elaboration on this point, see *infra* notes 101-107 and accompanying text; see also Lau, *Gender Recognition as a Human Right*, *supra* note 7, at 199–204.



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Court decides Ms. Kapali's case. This Article aims to inform the commentary surrounding the pending case, and to provide context for analyzing the Court's forthcoming ruling. While this Article centers on Nepal, it also has broader significance. This Article provides the most comprehensive study to date of gender self-determination laws around the world.<sup>12</sup> It thus offers insights that are relevant not only to Nepal but also to other countries that are considering reforms to gender identification policies.

The remainder of this Article consists of four main Parts. Part I provides a primer on existing Nepali law that is relevant to legal gender recognition. Part II illustrates the trajectory of law reform in South Asia and the rest of the world. This trajectory supports binary transgender persons' right to legal gender recognition. Part III explains that this trajectory in comparative law is undergirded by compelling human rights principles. Part IV contends that this trajectory of change—together with Nepal's constitutional law and international legal obligations—should guide legal reforms in Nepal. Finally, in the Conclusion, we summarize this Article and comment on its implications.

## I. PRIMER ON EXISTING NEPALI LAW

A natural starting point for understanding legal gender recognition in Nepal is the groundbreaking 2007 case of *Sunil Babu Pant v. Nepal*. The Supreme Court's opinion in *Pant* addressed a host of LGBTQ issues, but for the purposes of this Article, the opinion's greatest significance is its ruling that an individual's fundamental rights encompass the right to change one's legal gender based on "self-feelings" and "self-determination" as opposed to medical or other criteria.<sup>13</sup> The Court anchored this right in the protections of liberty, dignity, and equality in Nepal's 2007 Interim Constitution.<sup>14</sup>

<sup>12</sup> Other studies that have surveyed gender self-determination laws around the world are at least several years old; the legal landscape has changed dramatically in that time. *See, e.g.*, ZHAN CHIAM ET AL., ILGA WORLD, TRANS LEGAL MAPPING REPORT 2019: RECOGNITION BEFORE THE LAW (3d ed. 2020). This Article's analysis also differs from earlier comparative studies on legal gender recognition because we present a novel comparison of jurisprudence from the Supreme Court of Nepal, Supreme Court of India, and Inter-American Court of Human Rights. *See supra* Part III.

<sup>13</sup> *Sunil Babu Pant v. Government of Nepal*, NKP 2065 (2007) Vol. 50, No. 4, translated in *Sunil Babu Pant and Others v. Nepal Government and Others [Decision on the Rights of Lesbian, Gay, Bisexual, Transsexual and Intersex (LGBTI) People]*, 2 NJA L. J. 262, 280, 285 (2008) [hereinafter *Pant v. Nepal*].

<sup>14</sup> *Id.* at 284–85.



The Court's focus on self-determination was momentous not only for Nepal but also for the world. At the time, no other national apex court or national government had so clearly prioritized self-determination as the guiding principle for resolving matters concerning gender identity. Consider, for example, that at the time when *Pant* was pending, the United Kingdom's Gender Recognition Act (2004) was widely considered progressive because it did not require individuals to undergo any surgical or hormonal treatment prior to changing their legal gender; yet the United Kingdom's 2004 Act still required individuals to provide medical evidence of having gender dysphoria and of having lived in their "acquired gender" for at least two years.<sup>15</sup> The Nepal Supreme Court's decision in *Pant* transcended the law of the United Kingdom. While ordinary legislation and government policies in Nepal have failed to fully implement the Supreme Court's decision in *Pant*,<sup>16</sup> the Court's opinion in *Pant* was nonetheless groundbreaking in declaring that legal gender should be based on self-determination, not medical evidence or other onerous criteria.<sup>17</sup>

The *Pant* opinion's discussion on gender identity centered on the rights of third-gender individuals, in other words persons who identify

<sup>15</sup> See Andrew N. Sharpe, *Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category*, 15 FEMINIST LEGAL STUD. 57, 69–70 (2007); see also Michael Bochenek & Kyle Knight, *Establishing a Third Gender Category in Nepal: Process and Prognosis*, 26 EMORY INT'L L. J. 11, 19 (2012) (noting that the Supreme Court of Nepal's decision in *Pant* departed from the law of the United Kingdom because "the sole criterion for being legally recognized as third gender in Nepal would not be based on any medical (or other) criteria, but rather on self-identification.").

<sup>16</sup> This Article focuses on the Government of Nepal's current practices concerning legal gender recognition and the ways in which such practices do not comport with *Pant*, namely current practices' failure to extend legal gender recognition to binary transgender individuals. It is worth noting, however, that other areas of Nepali legislation and policy have also failed to implement *Pant*. For example, Nepal's Civil Code of 2017, which came into force in 2018, expressly defines marriage as a union between a man and a woman (Section 68). *Pant* had directed the Government to form a committee to study same-sex marriage. The 2015 report of the court-mandated and government-appointed Same-Sex Marriage Committee recommended amending legislation to legalize same-sex marriage. The Civil Code of 2017 contravenes this recommendation. In 2023, the Supreme Court ordered the government of Nepal to revise the Civil Code to provide for marriage equality. See *infra* notes 27–28 and accompanying text.

<sup>17</sup> The *Pant* judgment also spurred Nepal to adopt some trailblazing policy changes. For example, Nepal became the first country in the world to include a third gender category on its census. Editors, *How Did Nepal Become a Global LGBT Rights Beacon?*, WORLD POL. REV. (Aug. 11, 2017), <https://www.worldpoliticsreview.com/trend-lines/22936/how-did-nepal-become-a-global-lgbt-rights-beacon> [<https://perma.cc/BC3L-KMZD>].

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outside the man/woman binary.<sup>18</sup> Yet, as this Article will discuss in the following Parts, the principle of self-determination embraced in *Pant* applies with equal force to binary transgender individuals, including petitioner Rukshana Kapali.

In 2015, Nepal promulgated its current constitution. Like the 2007 Interim Constitution, the 2015 Constitution protects the rights to liberty, dignity, and equality, which formed the basis for the self-determination of legal gender envisioned in *Pant*.<sup>19</sup> The 2015 Constitution also makes specific reference to “gender identity” (*laiṅgik pahicān*) and “gender and sexual minorities” (*laiṅgik tathā yaunik alpasaṅkyak*).<sup>20</sup> Article 12 of the 2015 Constitution stipulates that certificates of citizenship by descent should be issued in accordance with gender identity. This reference to gender identity should be construed to mean gender self-identification. This understanding would comport with the protective spirit of Articles 18(3) and 42(1) of the Constitution, which respectively recognize that “gender and sexual minorities” are a disadvantaged group and declare that “gender and sexual minorities” are a social group entitled to participation in state bodies. Protecting gender and sexual minorities requires also honoring the self-determination of individuals within these groups, including the self-determination of binary transgender persons. Parts III and IV of this Article will elaborate on how the 2015 Constitution overlaps with international and comparative law in ways that support binary transgender persons’ self-determination.

Since the 2007 *Pant* case, The Supreme Court of Nepal has issued additional decisions that vindicated the rights of third-gender persons. In the 2013 case of *Dilu Buduja*, the Supreme Court ordered the government to provide third-gender persons with passports bearing the gender marker “O” for “other.”<sup>21</sup> The government changed its passport regulation accordingly

<sup>18</sup> Like *Pant*, subsequent Supreme Court cases also focused on third-gender persons. See *infra* notes 21-23 and accompanying text. Government officials in Nepal have focused so much on the third gender category that they have sometimes even categorized all lesbian, bisexual, and gay people as third gender even though doing so wrongly conflates sexual orientation with gender identity. See Khadgi, *supra* note 4.

<sup>19</sup> We elaborate on this point in Part III.

<sup>20</sup> CONST. OF NEPAL arts. 12, 18(3), 42(1) (2015).

<sup>21</sup> *Dilu Buduja v. Government of Nepal*, NKP 2070 (2013), Vol. 8, No. 9048. This case is summarized in National Judicial Academy, Nepal, *Compendium of Landmark Judgments of the Supreme Court of Nepal on Gender Justice and Equality* 126 (2020), available at <http://njanepal.org.np/public/reports/21040752654-landmark-decision-english.pdf> [<https://perma.cc/36N2-PUQG>].

in 2015.<sup>22</sup> Sunil Babu Pant also returned to the Supreme Court and obtained a favorable decision in 2017. The Court affirmed its 2007 *Pant* decision and directed government entities to ensure that the “other” gender marker be made available on citizenship certificates and other identity documents.<sup>23</sup> The pending case of *Kapali* presents the Supreme Court with an opportunity to extend its jurisprudence beyond the rights of third-gender persons to binary transgender individuals.

Indeed, in a December 2022 judgment concerning same-sex couples’ rights, the Court’s dicta gestured toward protecting binary transgender persons’ rights to legal gender recognition. This case, *Adheep Pokhrel v. Ministry of Home Affairs*, concerned two men who sought to have their marriage in Germany recognized in Nepal for the purposes of obtaining a non-tourist immigration visa.<sup>24</sup> The Court ruled in favor of the same-sex couple, echoing a case from 2017 concerning two married women.<sup>25</sup> The Court’s judgment commented on the rights of sexual and gender minorities beyond the specific dispute before the Court. In doing so, the Court seemed to telegraph the case of *Kapali*. It stated that “the issue that transgender men and women should be able to choose ‘male’ or ‘female’ as their gender

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<sup>22</sup> Asia Pacific Transgender Network & UNDP, *Legal Gender Recognition: A Multi-Country Legal and Policy Review in Asia* 33-34 (2017), available at [https://www.undp.org/sites/g/files/zskgke326/files/migration/asia\\_pacific\\_rbp/rbap-hhd-2017-legal-gender-recognition.pdf](https://www.undp.org/sites/g/files/zskgke326/files/migration/asia_pacific_rbp/rbap-hhd-2017-legal-gender-recognition.pdf) [<https://perma.cc/GZH3-W6NF>].

<sup>23</sup> Sunil Babu Pant v. Government of Nepal (also known as Anik Rana v. Government of Nepal), NKP 2074 (2017), Vol. 9, No. 9875 (English translation of this decision on file with authors). See also National Judicial Academy, Nepal, *supra* note 22, at 130 (providing case summary). Unless mentioned otherwise, all references in this Article to *Pant v. Nepal* refer to the 2007 judgment by this name cited *supra* in note 13, not the 2017 judgment bearing the same name. Some commentators interpret the 2017 *Pant* judgment as requiring the government to allow gender minorities to obtain name changes on identity documents. E.g., Asia Pacific Transgender Network & UNDP, *supra* note 22, at 32. Other commentators, however, have reported that government authorities have not viewed any of the Supreme Court’s orders as providing a right to name changes. See Rukshana Newa, *The Intricacy of Legal Gender Recognition in Nepal*, YOUTH VOICES COUNT (Jan. 15, 2020), <https://yvc-asiapacific.org/2020/01/15/the-intricacy-of-legal-gender-recognition-in-nepal> [<https://perma.cc/9PK8-LW5H>].

<sup>24</sup> *Adheep Pokhrel v. Ministry of Home Affairs*, Writ. No. 079-WO-0198 (2022) (unofficial English translation on file with authors). The Nepali text of this judgment is available at <https://supremecourt.gov.np/web/assets/downloads/judgements/079-WO-0198.pdf> [<https://perma.cc/78KL-8HC6>].

<sup>25</sup> *Id.* at ¶ 5; see also *Suman Panta v. Ministry of Home Affairs*, NKP 2074 (2017), Vol. 12, No. 9921 (case concerning two women who married abroad and sought a non-tourist visa in Nepal); Pradhan, Ghimire & Associates, *Suman Panta et al. v. Ministry of Home Affairs*, Writ. No. 073-WO-1054, decided 23 October 2017 (Client Briefing, June 2018) (summarizing in English the case of *Panta v. Ministry of Home Affairs*).

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according to their will, and the issue that other gender and sexual minorities should be able to state their third gender or binary gender on their personal documents and certificates should be viewed with high humanitarian sensitivity.”<sup>26</sup>

Most recently, in June 2023, the Supreme Court issued an interim order directing the government to register same-sex marriages and other non-heterosexual marriages; the decision granted marital rights to individuals on the basis of both sexual orientation and gender identity.<sup>27</sup> The Court also ordered the government to amend relevant provisions of Nepal’s Civil Code to provide for marriage equality.<sup>28</sup>

## II. GLOBAL TRAJECTORY OF LAW REFORM

A ruling that respects binary transgender persons’ right to legal gender recognition would not only maintain fidelity to Nepal’s constitution and the Supreme Court’s precedent; it would also align Nepali law with the trajectory of human rights reforms in South Asia and around the world. In past decisions concerning the rights of gender and sexual minorities, the Supreme Court has stated that it is important to be mindful of foreign and international developments.<sup>29</sup>

Over the past ten years, a growing number of countries have taken meaningful steps to recognize binary transgender persons’ self-identified gender. International and regional human rights institutions have also called on countries to recognize individuals’ self-identified gender. This Part of this Article will illustrate this trajectory of global reform, and then Part III will explain that the trajectory is firmly undergirded by human rights principles.

Although the Supreme Court’s decision in *Pant* positioned Nepal at the forefront of nations respecting gender self-determination, other countries have since surpassed Nepal by protecting the gender self-determination of binary as well as non-binary individuals. The pending case of *Kapali* presents the Supreme Court with the opportunity to reposition Nepal so that

<sup>26</sup> Pokhrel v. Ministry of Home Affairs, at ¶ 26.

<sup>27</sup> Pinky Gurung v. Government of Nepal, Writ No. 079-WO-1382 (2023).

<sup>28</sup> *Id.*

<sup>29</sup> Indeed, *Pant* cited numerous sources of international and foreign law. *See generally* Pant v. Nepal, *supra* note 13. More recently, in the case of *Pokhrel*, the Supreme Court stated that “the Court must be more aware and mindful of global values of gender justice and jurisprudence.” Pokhrel v. Ministry of Home Affairs, at ¶ 26. *See also* Malagodi, *Challenges and Opportunities*, *supra* note 7, at 549 (discussing the Court’s references to international and foreign law in gender equality cases).

Nepal stands once again among countries leading in the protection of gender identity rights. The principle of self-determination that the Court embraced in *Pant* is not fully realized unless the self-determination of binary transgender persons is respected.

This Part will begin by mapping out the trajectory of law reform in Nepal’s neighboring South Asian countries. It will then zoom out to show the trajectory of change across the world.

#### A. Within South Asia

A number of countries in South Asia have taken important steps to expand legal gender recognition.<sup>30</sup> Developments in India and Pakistan are particularly noteworthy because these countries have made strides in respecting both binary and non-binary persons’ rights to legal gender recognition.

The Supreme Court of India advanced gender identity rights in the landmark case of *NALSA v. Union of India* (2014).<sup>31</sup> The two Member Bench jointly declared, *inter alia*, that “Transgender persons’ right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.”<sup>32</sup> It is worth emphasizing that this declaration recognized that transgender persons have a right to choose a binary gender category (“male” or “female”) instead of being limited to the “third gender” category.<sup>33</sup> Similarly, in the main *NALSA* opinion, Justice Radhakrishnan acknowledged that “self-identified gender can be male or female or a third

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<sup>30</sup> See Jeffrey A. Redding, *Kashmir and Transgender Rights*, NAT’L L. SCH. INDIA REV. 1, 1 (2020) (“The elaboration of transgender rights in South Asia has been one of this century’s most remarkable socio-legal developments. . . . in states as diverse as Nepal, Pakistan, India, and Bangladesh, transgender people have seemingly come to sit at the center of a rich conversation about how law can and should be used to counter social and political marginalization.”).

<sup>31</sup> Nat’l Legal Servs. Auth. (*NALSA*) v. India (2014) 5 SCC 438.

<sup>32</sup> *Id.* at ¶ 129. The main opinion in *NALSA*, authored by Justice Radhakrishnan, linked legal gender recognition to constitutionally protected rights to autonomy, privacy, dignity, equality, and expression. This reasoning will be discussed in detail in Section 2.3 of this report.

<sup>33</sup> Although the original petition in *NALSA* focused only on the rights of third-gender persons, advocates filed subsequent briefs that expanded the scope of the case to address individuals who wish to transition from one binary gender category to another, in other words from male to female and vice versa. Danish Sheik, *A Tale of Two Judgments: The Afterlives of a Defeat and a Victory for Queer Rights in India*, LGBTQ POL’Y J. 57, 63 (2018).

gender.”<sup>34</sup> The opinion repeatedly acknowledged the importance of self-identification and self-determination.<sup>35</sup>

Regrettably, implementation of the *NALSA* judgment has been lacking. India’s Transgender Persons (Protection of Rights) Act of 2019 falls short of *NALSA*’s requirements. For example, it requires transgender individuals to furnish proof of undergoing “surgery to change gender” before switching their legal gender from male to female or vice versa.<sup>36</sup> This surgical requirement contravenes the *NALSA* judgment’s protection of transgender persons’ rights to self-determination. Due to this and other flaws of the 2019 Act, human rights advocates have filed a Supreme Court petition challenging the constitutionality of the 2019 Act.<sup>37</sup> Indeed, it is the Indian Supreme Court’s *NALSA* judgment—not India’s 2019 Act—that should help the Supreme Court of Nepal navigate the current case concerning legal gender recognition in Nepal.

Compared with India, Pakistan has gone further to operationalize transgender persons’ right to legal gender recognition. Following years of litigation and public debate, Pakistan enacted the Transgender Persons (Protection of Rights) Act of 2018, which gives transgender persons the “right to be recognized as per his or her self-perceived gender identity” without any medical or diagnostic requirements.<sup>38</sup> Pakistan’s 2018 Act

<sup>34</sup> *NALSA*, 5 SCC 438, ¶ 70. In his concurring opinion, Justice Sikri said he was “entirely in agreement” with Justice Radhakrishnan’s main opinion, including “every word.” *Id.* at ¶¶ 78, 82.

<sup>35</sup> See e.g., *id.* at ¶¶ 19, 20, 22 (quoting the Yogyakarta Principles), 62, 66, 69, 70, 74, 76. Justice Radhakrishnan’s opinion also stated that “no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity” *Id.* at ¶ 20. Despite saying that he was “entirely in agreement” (*id.* at ¶ 78) with Justice Radhakrishnan’s main opinion, Justice Sikri’s separate opinion contained confounding passages that could be interpreted as suggesting the government is permitted to require surgery for changing one’s legal gender from male to female or vice versa. *Id.* at ¶¶ 105–06.

<sup>36</sup> Transgender Persons (Protection of Rights) Act of 2019 (India), § 7.

<sup>37</sup> The petition was filed on 6 December 2020 and is currently pending. Almas Shaikh, *Grace Banu Ganesan & Ors. v. Union of India & Anr. / A Constitutional Challenge to The Transgender Persons (Protection of Rights) Act 2019*, CTR. FOR L. & POL’Y RSCH. (June 18, 2020), <https://clpr.org.in/litigation/grace-banu-ganesan-ors-v-union-of-india-anr> [https://perma.cc/A3MC-4J86].

<sup>38</sup> Transgender Persons (Protection of Rights) Act of 2018 (Pakistan), § 3. For discussions of this law, see Amna Rashid & Umar Rashid, *Constitutional and Legal Guarantees for Transgender in Pakistan: Reforms and Failures in Law*, in *TOWARDS GENDER EQUALITY IN LAW: AN ANALYSIS OF STATE FAILURES IN GLOBAL PERSPECTIVE* 79–110 (Gizem Guney, David Davies & Po-Han Lee eds., 2022); INT’L COMM’N JURISTS, *PAKISTAN: TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2018* 13 (2020) (briefing paper);



defines “transgender” capaciously to include “any person whose gender identity or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.”<sup>39</sup> The International Commission of Jurists (ICJ) has noted that Pakistan’s 2018 Act is “one of the more progressive gender recognition laws not just in Asia, but also globally.”<sup>40</sup>

In May 2023, Pakistan’s Federal Shariat Court ruled that the 2018 Act’s provisions on self-declaration of legal gender violate Islamic law and shall cease to have legal effect.<sup>41</sup> The Human Rights Commission of Pakistan has labeled this decision a “regressive ruling,” and human rights defenders have vowed to appeal the ruling to the Supreme Court of Pakistan.<sup>42</sup> For the purposes of this Article, we note that the Federal Shariat Court’s decision should not be considered persuasive authority in Nepal because Nepal’s constitutional system is not based on Islamic law. Notwithstanding the Islamic court’s ruling, the enactment of Pakistan’s 2018 Act was a groundbreaking development in the expansion of gender identity rights in South Asia.

The advancement of gender identity rights in South Asia echoes pre-colonial cultural traditions in the region that recognized and, to a noteworthy extent, respected diversity of gender identity. Indeed, in *NALSA*, the Supreme Court of India noted that “historical background of Transgenders in India . . . [is such] that they were once treated with great respect, at least

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Jeffrey A. Redding, *The Pakistan Transgender Persons (Protection of Rights) Act of 2018 and Its Impact on the Law of Gender in Pakistan*, 20 AUSTRAL. J. ASIAN L. 103, 104 (2019).

<sup>39</sup> Section 2(1)(n) of Pakistan’s 2018 Act states that a “transgender person” is someone who is:

- (i) intersex (khusra) with mixture of male and female genital features or congenital ambiguities; or
- (ii) eunuch assigned male at birth, but undergoes genital excision or castration; or
- (iii) a transgender man, transgender woman, Khawaja Sira or any person whose gender identity or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.

For a criticism of the 2018 Act’s conflation of transgender and intersex, see INT’L COMM’N JURISTS, *supra* note 27, at 9.

<sup>40</sup> *Id.* at 14. *See also* Rashid & Rashid, *supra* note 38, at 100 (“The 2018 act puts Pakistan at the forefront in the protection of the rights of transgender people in the world, at least on paper.”).

<sup>41</sup> *Hammad Hussein v. Federation of Pakistan*, S.P. No.05/I/2020 + 11 Connected Shariat Petitions, May 19, 2023 (opinion on file with authors).

<sup>42</sup> Pakistani Transgender Activists to Appeal Shariah Court Ruling Against Law Aimed at Protecting Them, AP News, May 20, 2023, <https://apnews.com/article/pakistan-transgender-courts-b1674911f47712782e8947ef273382ba> [<https://perma.cc/DGV2-R3LX>].



in the past, though not in the present.”<sup>43</sup> Law reforms to protect gender self-determination have not, however, been limited to parts of the world that share South Asia’s cultural traditions. The recent rights developments in India and Pakistan are part of a larger trend around the world in which countries are expanding people’s ability to change their legal gender based on self-determination. The following section will examine relevant developments outside of South Asia.

### B. *Beyond South Asia*

The self-determination approach to legal gender has been adopted by a growing number of countries around the world. In 2012, Argentina became the first country to allow people to change their legal gender from male to female and vice versa based on self-determination. Roughly a decade later, there is now a visible trend in which countries are making it possible for binary transgender persons to change their legal gender without any medical requirements. Looking beyond South Asia, which was discussed in the preceding section, the list of countries that have adopted self-determination approaches to gender at the national level include at least Argentina, Belgium, Brazil, Chile, Colombia, Costa Rica, Denmark, Finland, Iceland, Ireland, Luxembourg, Malta, New Zealand, Norway, Portugal, Spain, Switzerland, the United States, and Uruguay.<sup>44</sup> All these countries allow adults to change their gender markers on identity documents from male to

<sup>43</sup> *NALSA*, 5 SCC 438, ¶ 44. Commentators have made similar observations. *E.g.*, Rashid & Rashid, *supra* note 38, at 81-82 (discussing the “importance and acceptance” of gender minorities known as *khawaja siras* and *hijras* in pre-colonial India and Pakistan); Kyle Knight, *How Nepal’s Constitution Got Queered*, L.A. REV. BOOKS (Oct. 14, 2015), <https://lareviewofbooks.org/article/how-nepals-constitution-got-queered> [https://perma.cc/7L63-AH9U] (“the third-gender category’s legal battle [in Nepal] gained traction in part because it carried historical echoes of South Asia’s *hijra* culture”).

<sup>44</sup> This list of countries is not exhaustive. There are additional countries that have, to varying degrees, adopted laws or policies that allow the self-determination of legal gender. It is worth noting that some countries we omitted from the list—including Andorra, France, and Greece—have removed medical criteria for changing a person’s legal gender, but they require persons to undergo potentially onerous judicial screenings to change legal gender. In Greece, for example, judges may evaluate whether an applicant’s appearance comports with expectations for the gender with which the applicant identifies. *See Greece: Vote on Legal Gender Recognition Is an Historic Step Forward for Transgender Rights*, AMNESTY INTERNATIONAL (Oct. 10, 2017), <https://www.amnesty.org/en/latest/press-release/2017/10/greece-vote-on-legal-gender-recognition-is-an-historic-step-forward-for-transgender-rights> [https://perma.cc/RP2J-A4Q7]. Because such onerous judicial screenings undermine self-determination, commentators often consider these countries’ gender recognition policies as not fully embodying self-determination principles.

female and vice versa through an administrative process; some of these countries also offer a non-binary identification option.

Argentina. Argentina's groundbreaking Gender Identity Law, enacted in 2012, gives all persons the "right to gender identity."<sup>45</sup> Articles 3 and 4 of the law stipulate that persons may, without providing any medical evidence, change their gender on identity documents "whenever they do not correspond with the self-perceived gender identity."<sup>46</sup> In 2021, the president of Argentina issued a decree allowing individuals to select a non-binary gender marker on identity documents whereas previously only binary options were offered.<sup>47</sup>

Belgium. In 2017, Belgium adopted legislation removing a legal provision that had previously imposed medical conditions for changing one's documented legal gender.<sup>48</sup> In 2019, the Constitutional Court of Belgium ruled that people should be allowed to change their gender registration more than once.<sup>49</sup> It also held that Belgium's gender recognition law impermissibly discriminated against non-binary persons because it only allowed people to choose between male and female gender options.<sup>50</sup>

Brazil. In 2018, the Supreme Court of Brazil removed all medical criteria for changing one's legal gender.<sup>51</sup>

Chile. In 2018, Chile enacted Ley 21.120, which went into effect in December 2019. This law allows people to change their gender markers on

<sup>45</sup> Ley 26.743/2012, art. 1. An English translation is available at *Argentina Gender Identity Law*, TGEU (Sept. 12, 2013), <https://tgeu.org/argentina-gender-identity-law> [<https://perma.cc/TD5S-RRT3>].

<sup>46</sup> *Id.* at arts. 3–4.

<sup>47</sup> Decreto 476/2021.

<sup>48</sup> Loi du 25 juin 2017, publié le 10 juillet 2017 (Loi réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'une modification de l'enregistrement du sexe dans les actes de l'état civil et ses effets); *see also* FED. PUB. SERV., *New Legislation for Transgender Persons*, (December 2020), [https://justice.belgium.be/en/themes\\_and\\_files/people\\_and\\_families/new\\_legislation\\_for\\_transgender\\_persons](https://justice.belgium.be/en/themes_and_files/people_and_families/new_legislation_for_transgender_persons) [<https://perma.cc/LHW4-9GG3>].

<sup>49</sup> Cour constitutionnelle, arrêt n° 99/2019 du 19 juin 2019; *see also* Petra Meier & Joz Motmans, *Trans Laws and Constitutional Rulings in Belgium: The Ambiguous Relations between Sex and Gender*, 8 POL. & GOVERNANCE 242, 245 (2020).

<sup>50</sup> Meier & Motmans, *supra* note 35, at 245.

<sup>51</sup> *See* Ana Carla Harmatiuk Matos, *Gender Identity and the LGBT Movement in Brazil*, in TRANS RIGHTS AND WRONGS 51, 53–54 (Isabel C. Jaramillo & Laura Carlson eds., 2021) (discussing the Supreme Court's decisions in RE 670.422 and ADI 4.275/DF); *see also* CHIAM ET AL., *supra* note 12, at 188.

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identity documents without requiring applicants to provide any medical evidence.<sup>52</sup>

Colombia. In 2015, a presidential decree (Decreto 1227/2015) established that people can change their gender on identity documents and that no medical evidence is required from applicants. This decree was prompted by a series of rulings in which the Constitutional Court of Colombia established a right to legal gender recognition.<sup>53</sup>

Costa Rica. In 2018, the president of the Costa Rica signed an executive order and a directive ordering government agencies to recognize self-determined gender on official documents.<sup>54</sup>

Denmark. In 2014, Denmark amended the Act on the Civil Registration System so that people can change their legal gender based solely on self-determination.<sup>55</sup>

Finland. Finland passed a law in February 2023 that allows people to change to change their legal gender based entirely on self-determination.<sup>56</sup>

Iceland. In 2019, Iceland adopted the Act on Gender Autonomy No. 80/2019, which “provides for the right of persons to define their own gender, thereby aiming at guaranteeing the recognition of their gender identity.”<sup>57</sup> The Act abolished medical requirements for changing one’s legal gender and created a non-binary gender option.

<sup>52</sup> Ley 21.120, reconoce y da protección al derecho a la identidad de género (2018).

<sup>53</sup> See Stefano Osella & Ruth Rubio-Marin, *The Right to Gender Recognition before the Colombian Constitutional Court: A Queer and Travesti Theory Analysis*, 40 BULL. LAT. AM. RSCH, 650, 650–51 (2021).

<sup>54</sup> Decreto Ejecutivo No. 41173-MP; Directriz Presidencial No. 015-P; see also José Miguel Vivanco, *Costa Rica Joins Global Push to Recognize Legal Gender Self-Identification*, HUM. RTS. WATCH (Aug. 8, 2018), <https://www.hrw.org/news/2018/08/08/costa-rica-joins-global-push-recognize-legal-gender-self-identification> [https://perma.cc/G8WK-9UQ9].

<sup>55</sup> Lov 752/2014 Lov om ændring af lov om Det Centrale Personregister.

<sup>56</sup> *Finland Ends Infertility Requirement for Transgender People*, ASSOCIATED PRESS (Feb. 1, 2023), <https://apnews.com/article/finland-government-health-gender-96385b422c43ee8722fcec03b678d9b5> [https://perma.cc/2CDT-BDPL]; see also Kysymyksiä ja Vastauksia Sukupuolen Vahvistamista Koskevasta Hallituksen Esityksestä, FIN. SOC. & HEALTH MINISTRY (last visited Feb. 14, 2023), <https://stm.fi/sukupuolen-vahvistaminen> [https://perma.cc/SVN8-NSX9].

<sup>57</sup> Act on Gender Autonomy No. 80/2019, art. 1. A translation is available in English at *Act on Gender Autonomy*, GOV'T OF ICE. (May 8, 2020), <https://www.government.is/publications/legislation/lex/2020/05/08/Act-on-Gender-Autonomy> [https://perma.cc/844K-XHFD].

Ireland. In Ireland, the Gender Recognition Act 2015 (25/2015) allows people to change their legal gender based on self-determination alone.

Luxembourg. In 2018, Luxembourg passed a law that is based on a self-determination approach to gender.<sup>58</sup> The law states: “The fact of not having undergone medical treatment, surgery or sterilization cannot justify the refusal to grant the request.”<sup>59</sup>

Malta. In Malta, the Gender Identity, Gender Expression, and Sex Characteristics Act 2015 gives people the right to legal gender recognition. Section 3(4) of the Act states: “The person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity.” In 2017, Malta introduced a non-binary gender option to Maltese passports and identification cards, whereas only binary gender options were previously available.<sup>60</sup>

New Zealand. In 2021, New Zealand unanimously passed legislation to allow persons to change the gender marker on their birth certificates based on self-determination.<sup>61</sup> The law went into effect in 2023. New Zealand had already previously allows individuals to change the gender on their passports and driver’s licenses based on self-determination.<sup>62</sup>

Norway. In 2016, Norway reformed its laws to allow people to change their legal gender without providing any proof of medical diagnosis or treatment.<sup>63</sup>

<sup>58</sup> Loi du 10 août 2018 relative à la modification de la mention du sexe et du ou des prénoms à l’état civil et portant modification du Code civil.

<sup>59</sup> *Id.* at art. 2.

<sup>60</sup> *Legal Gender Recognition and Bodily Integrity*, HUM. RTS. DIRECTORATE (last updated Dec. 10, 2020), <https://humanrights.gov.mt/en/Pages/LGBTIQ%20Equality/Legal%20Provisions/Legal-Gender-Recognition-and-Bodily-Integrity.aspx> [<https://perma.cc/U2H2-YE8J>].

<sup>61</sup> Births, Deaths, Marriages, and Relationships Registration Act 2021.

<sup>62</sup> Kelly Buchanan, *New Zealand: Bill Enabling Gender Self-Identification on Birth Certificates Passed*, U.S. LIBR. OF CONG., <https://www.loc.gov/item/global-legal-monitor/2021-12-20/new-zealand-bill-enabling-gender-self-identification-on-birth-certificates-passed> [<https://perma.cc/F47X-KRML>] (last visited Jan. 9, 2022).

<sup>63</sup> See Lov om endring av juridisk kjønn, 2016, (LOV-2016-06-17-46); Anniken Sørli, *The Right to Trans-Specific Healthcare in Norway: Understanding the Health Needs of Transgender People*, 27 MED. L. REV. 295, 299 (2019).

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Portugal. In 2018, Portugal enacted Lei no. 38/2018, which embodies a self-determination approach to legal gender. The law abolished medical diagnosis as a requirement for adults seeking to change their legal gender.<sup>64</sup>

Spain. In February 2023, Spain's parliament passed a law that adopted a self-determination approach to legal gender.<sup>65</sup> The law went into effect in March 2023.<sup>66</sup> Article 44(3) of the law states that a change to a person's legal gender "may in no case be conditioned on the prior exhibition of a medical or psychological report related to discrepancy with the sex mentioned in birth registration, nor on the prior modification of appearance or bodily function of the person through medical, surgical or other procedures."

Switzerland. Since 2022, Switzerland has allowed persons to change their legal gender based on self-determination. This development stemmed from a 2021 decision of the Federal Council and an amendment that the Swiss Parliament made to the Swiss Civil Code in 2020.<sup>67</sup>

United States of America. In 2021, the United States Department of State began allowing individuals to change the gender marker on their

<sup>64</sup> Medical diagnosis had been required by an earlier law, Lei no. 7/2011, art. 3.

<sup>65</sup> Ley 4/2023, de 28 de febrero, para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI, tit. II, ch. 1; *see also* Cristian González Cabrera, *Victory in Fight for Gender Recognition in Spain*, HUM. RTS. WATCH (Feb. 16, 2022), <https://www.hrw.org/news/2023/02/16/victory-fight-gender-recognition-spain-0> [https://perma.cc/452E-C7H5].

<sup>66</sup> *See* Ley 4/2023, *supra* note 65, at Final Provision no. 20.

<sup>67</sup> *Débureaucratisation de la procédure de changement de sexe à l'état civil dès le 1er janvier 2022*, LE CONSEIL FEDERAL (Oct. 27, 2021), <https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-85588.html> [https://perma.cc/2Q8M-9HLR].

passport based on self-determination.<sup>68</sup> Individuals can select from binary gender categories and a non-binary option.<sup>69</sup>

Uruguay. In Uruguay, Ley No. 19684 (2018) states that every person has the right to self-determination of gender and to have such gender reflected on one's identity documents.<sup>70</sup>

Beyond the countries discussed thus far, other countries—including Cyprus<sup>71</sup> and Germany<sup>72</sup>—have gender recognition bills under consideration.<sup>73</sup> Additionally, in 2017, Botswana's High Court ordered Botswana's government to ensure that "all State-issued identity documents

<sup>68</sup> See Antony J. Blinkin, *Proposing Changes to the Department's Policies on Gender on U.S. Passports and Consular Reports of Birth Abroad*, U.S. DEP'T OF STATE (June 30, 2021), <https://www.state.gov/proposing-changes-to-the-departments-policies-on-gender-on-u-s-passports-and-consular-reports-of-birth-abroad> [<https://perma.cc/M2Y3-SU3S>] (press statement); *Selecting Your Gender Marker*, U.S. DEP'T OF STATE – BUREAU OF CONSULAR AFFS., <https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gender-marker.html> [<https://perma.cc/CR8J-62B2>] (last visited Jan. 9, 2022). It is worth noting that, at the subnational level, many states in the United States maintain medical requirements for changing one's gender markers on the identity documents they issue. See Katri, *supra* note 10. Nonetheless, at the federal level and among many states in the United States, there has been a marked shift toward self-determination models of legal gender. See *ibid.*; Noa Ben-Asher, *Transforming Legal Sex*, N.C. L. REV. (forthcoming).

<sup>69</sup> Ned Price, *Issuance of the First U.S. Passport with an X Gender Marker*, U.S. DEP'T OF STATE (Oct. 27, 2022), <https://www.state.gov/issuance-of-the-first-u-s-passport-with-an-x-gender-marker> [<https://perma.cc/GSZ6-2MKW>].

<sup>70</sup> Ley No. 19684, Ley Integral para Personas Trans, art. 1 (2018).

<sup>71</sup> Gina Agapiou, 'Groundbreaking' Gender Identity Bill Brought to the House, CYPRUS MAIL (Nov. 24, 2022), <https://cyprus-mail.com/2022/11/24/groundbreaking-gender-identity-bill-brought-to-the-house/> [<https://perma.cc/TK8S-2PBC>].

<sup>72</sup> Geir Moulson, *The German Cabinet Has Approved a Plan to Make It Easier for People to Legally Change Name, Gender*, ASSOCIATED PRESS (Aug. 23, 2023), <https://apnews.com/article/germany-transgender-legal-registry-changes-16abda63c22f7ac800ee126e6f51d856> [<https://perma.cc/7DE7-KCKM>].

<sup>73</sup> Scotland's Parliament also passed a bill that would allow people to change their legal gender based on self-determination, but the UK Government has blocked the bill from receiving royal assent. First Minister Nicola Sturgeon of Scotland has said that Scotland will challenge the UK Government's action in court. See Robert Taylor, *Q&A: Why Are the Scottish and UK Governments Going to Court over Gender Recognition Laws?*, THE CONVERSATION (Jan. 20, 2023), <https://theconversation.com/qanda-why-are-the-scottish-and-uk-governments-going-to-court-over-gender-recognition-laws-197981> [<https://perma.cc/43ME-BCMV>].

which indicate a person's gender/sex reflect the person's self-defined gender identity."<sup>74</sup> Implementation of that ruling, however, remains to be seen.<sup>75</sup>

At supranational levels, various entities have spoken in support of laws and policies that allow for self-determination of legal gender. The U.N. Independent Expert on violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, and the Office of the U.N. High Commissioner for Human Rights (OHCHR) have called on countries to provide individuals with a simple process for changing gender markers on identity documents. They have stated that this process should be based on self-determination.<sup>76</sup> Similar calls were made by respected human rights experts in the Yogyakarta Principles (YP) and Yogyakarta Principles Plus 10 (YP+10).<sup>77</sup>

Regional human rights institutions have also advanced the right to legal gender recognition. In a landmark advisory opinion in 2018, the Inter-American Court of Human Rights declared that transgender individuals have the right to be recognized in their self-determined gender including on identification documents.<sup>78</sup> In Europe, the Council of Europe's Parliamentary Assembly has stated that governments should "develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents" and to "consider including a third gender option in

<sup>74</sup> ND v. Attorney General of Botswana (2017) MAHGB-000449-15, ¶ 80 (High Court at Lobatse).

<sup>75</sup> See ALEX MÜLLER, S. AFR. LITIG. CTR., *LEGAL GENDER RECOGNITION IN BOTSWANA* 25–26 (2020).

<sup>76</sup> U.N. Secretary-General, *Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, ¶¶ 81(a)–(e), U.N. Doc. A/73/152 (July 12, 2018); U.N. High Commissioner for Human Rights, *Discrimination and Violence against Individuals Based on Their Sexual Orientation and Gender Identity*, ¶¶ 73, 79(i), U.N. Doc. A/HRC/29/23 (May 4, 2015).

<sup>77</sup> Yogyakarta Principles, princ. 3 (2007); Yogyakarta Principles Plus 10, princ. 31 (2017). The YP and YP+10 were adopted by a distinguished group of international human rights experts. The YP outlined ways in which international human rights law protects people in matters concerning sexual orientation and gender identity; the YP+10 elaborated on the YP and expanded its scope to cover matters concerning gender expression and sex characteristics. For further background, see Andrew Park, *Yogyakarta plus 10: A Demand for Recognition of SOGIESC*, 44 N.C. J. INT'L L. 223, 226–47 (2019).

<sup>78</sup> State Obligations in Relation to Change of Name, Gender Identity, and Rights Deriving from a Relationship between Same-Sex Couples, Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ¶¶ 85–171 (Nov. 24, 2017) [hereinafter *Advisory Opinion OC-24/17*]. This advisory opinion will be discussed in greater detail *infra* in Part III.



identity documents for those who seek it.”<sup>79</sup> Although the European Court of Human Rights has yet to fully adopt a self-determination approach to gender identity, it has through a series of cases incrementally reduced barriers to changing one’s legal gender.<sup>80</sup>

In sum, in the years since the Supreme Court of Nepal endorsed the self-determination of gender in *Pant*, a visible trajectory of global reform has emerged. A growing number of countries and supranational entities have come to respect and promote legal gender recognition based on self-determination. In particular, the global trajectory supports extending the right of legal gender recognition to binary transgender persons.

### III. HUMAN RIGHTS PRINCIPLES UNDERGIRDING THE TRAJECTORY

The global trajectory described in Part II is well-supported by human rights principles that are enshrined in both Nepali constitutional law and international human rights treaties to which Nepal is a State Party. This section of the Article will identify and discuss the various human rights principles that underpin robust protections of transgender persons’ right to legal gender recognition.<sup>81</sup>

Liberty principles support the right of individuals to self-determine their legal gender. Indeed, the Supreme Court of Nepal acknowledged this point in *Pant* by holding that depriving third-gender persons of legal gender recognition violated the protection of liberty in Article 12(2) of the 2007 Interim Constitution.<sup>82</sup> By the same logic, depriving binary transgender persons of legal gender recognition violates the liberty protection in Article 17(1) of the 2015 Constitution.

Liberty encompasses personal autonomy, in other words the freedom to make important decisions about oneself, for oneself.<sup>83</sup> Personal autonomy is a principle that underlies the international human rights system, appearing in various provisions of the Universal Declaration of Human Rights.<sup>84</sup>

<sup>79</sup> Eur. Parl. Ass., *Resolution 2048 on Discrimination Against Transgender People in Europe*, Doc. No. 13742, ¶¶ 6.2.1, 6.2.4 (2015).

<sup>80</sup> See Pieter Cannoot, *The Pathologisation of Trans\* Persons in the ECtHR’s Case Law on Legal Gender Recognition*, 37 NETH. Q. HUM. RTS. 14 (2019).

<sup>81</sup> This Part of our Article will draw heavily from Lau, *Gender Recognition as a Human Right*, *supra* note 7.

<sup>82</sup> *Pant v. Nepal*, *supra* note 13, at 284–85.

<sup>83</sup> See Lau, *Gender Recognition as a Human Right*, *supra* note 7, at 194–96.

<sup>84</sup> See Rhoda E. Howard & Jack Donnelly, *Human Dignity, Human Rights, and Political Regimes*, 80 AM. POL. SCI. REV. 801, 805 (1986). For example, Article 22 of the Universal Declaration of Human Rights speaks of the individual’s right to “free development of his

Deciding one's own gender is fundamentally about personal autonomy. It is instructive to examine two of the world's leading court opinions on the self-determination of legal gender—Justice Radhakrishnan's opinion in *NALSA* and the Inter-American Court of Human Rights' advisory opinion concerning gender identity. These two opinions examined at great lengths the relationship between gender self-determination and human rights principles. They therefore warrant close attention. Both of these opinions explained that the protection of autonomy requires states to permit the self-determination of legal gender.<sup>85</sup>

Liberty also encompasses privacy.<sup>86</sup> The Indian Supreme Court and the Inter-American Court of Human Rights have both stated that the right to legal gender recognition is required by protections of privacy.<sup>87</sup> Indeed, the protection of privacy strongly undergirds the global trajectory of expanding transgender persons' right to legal gender recognition. Human rights experts have interpreted privacy rights to include decisional privacy, informational privacy, and bodily integrity.<sup>88</sup> Accordingly, transgender individuals should have the right to decide their own gender (decisional privacy), right not to be outed as transgender by identity documents that do not match their self-determined gender (informational privacy), and right not to be coerced into surgeries and other invasive medical treatments (bodily integrity).<sup>89</sup> It is worth noting that privacy is not only protected by Section 17(1) of Nepal's

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personality.” While discussing Article 22, former judge Loukis Loucaides of the European Court of Human Rights remarked: “For man to be able to function freely, in the full sense of the term, he must have the possibility of self-definition and self-determination: the right to be himself. Thus, the achievement of effective protections of freedom of the person requires legal recognition and safeguarding of his personality.” LOUKIS G. LOUCAIDES, *ESSAYS ON THE DEVELOPING LAW OF HUMAN RIGHTS* 83–84 (1995).

<sup>85</sup> See, e.g., *NALSA*, 5 SCC 438, ¶ 69 (J. Radhakrishnan) (“Self-determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.”); Advisory Opinion OC 24-17, *supra* note 61, at ¶ 90 (“this Court has indicated that the right to identity is closely related to human dignity, the right to privacy and the principle of personal autonomy (Articles 7 and 11 of the American Convention)”).

<sup>86</sup> See, e.g., *NALSA*, 5 SCC 438, ¶ 67 (J. Radhakrishnan) (stating that the right to privacy is subsumed by the protection of life and liberty in Article 21 of the Indian Constitution); see also *id.* (noting that “values of privacy, self-identity, autonomy and personal integrity are fundamental rights”).

<sup>87</sup> See, e.g., *id.* at ¶¶ 66–67; Advisory Opinion OC 24-17, *supra* note 61, at ¶ 89 (“the Court understands that the right to identity arises from recognition of the free development of the personality and the protection of the right to privacy”); *id.* at ¶ 90 (“this Court has indicated that the right to identity is closely related to human dignity, the right to privacy and the principle of personal autonomy (Articles 7 and 11 of the American Convention)”).

<sup>88</sup> See Lau, *Gender Recognition as a Human Right*, *supra* note 7, at 196–99.

<sup>89</sup> *Id.*

Constitution as a component of “liberty”; privacy is also protected by international treaties, including the International Covenant on Civil and Political Rights (“ICCPR”), which binds Nepal as a State Party.<sup>90</sup>

Denying transgender persons of legal gender recognition also amounts to an infringement of equality and non-discrimination. In *Pant*, the Supreme Court of Nepal acknowledged that depriving people of legal gender recognition can violate constitutionally protected rights to equality.<sup>91</sup> Justice Radhakrishnan’s opinion in *NALSA* and the Inter-American Court of Human Rights’ advisory opinion similarly acknowledged that equality is undermined when the state deprives transgender persons of legal gender recognition.<sup>92</sup> Not only is unequal access to legal gender recognition itself in contravention of equality; having identity documents that do not match one’s gender can hinder an individual’s ability to enjoy other rights when access is contingent on providing identity documents (e.g., access to voting). As the Inter-American Court of Human Rights put it: “depriving the right to identity, or a legal vacuum in the domestic law for its effective practice, places people in situations that hinder or prevent the enjoyment of or access to basic rights, thus creating differences in treatment and opportunities that affect the principles of equality before the law and non-discrimination, and obstructing the right of everyone to full recognition of their legal personality.”<sup>93</sup>

The global trajectory of expanding legal gender recognition is also underpinned by the human right to health. To be sure, being a transgender person is not necessarily related to any medical condition, and it is certainly not a pathology.<sup>94</sup> Indeed, for many transgender persons, their gender

<sup>90</sup> See G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, at art. 17 (Dec. 16, 1966); see also Alexandra Rengel, *Privacy as an International Human Right and the Right to Obscurity in Cyberspace*, 2 GRONINGEN J. INT’L L 33, 40 (2014) (“A review of the basic international conventions of international human rights reveals that privacy is mentioned in most of them.”).

<sup>91</sup> *Pant v. Nepal*, *supra* note 13, at 284–85. At the time of the ruling in *Pant*, equality rights were protected by Article 13 of the Interim Constitution. In the 2015 Constitution, the right to equality is enshrined in Article 18(1). Additionally, Article 18(3) recognizes “gender and sexual minorities” as a disadvantaged group, and Article 42(1) identifies “gender and sexual minorities” as a social group entitled to participation in public bodies.

<sup>92</sup> See, e.g., *NALSA*, 5 SCC 438, ¶¶ 56–59, 75–77 (J. Radhakrishnan); Advisory Opinion OC 24-17, *supra* note 61, at ¶¶ 99, 134.

<sup>93</sup> Advisory Opinion OC 24-17, *supra* note 61, at ¶ 99.

<sup>94</sup> “The expression of gender characteristics, including identities, that are not stereotypically associated with one’s sex assigned at birth is a common and a culturally diverse human phenomenon that should not be seen as inherently negative or pathological.” World Pro. Ass’n for Transgender Health, *Standards of Care for the Health of Transsexual,*

identity is not a health issue. Transgender persons should therefore not be required to furnish any medical evidence to change their legal gender. With that said, some transgender persons may experience gender dysphoria.<sup>95</sup> The American Psychiatric Association has said that treatment of gender dysphoria requires both “social and *legal* transition to the [patient’s] desired gender.”<sup>96</sup> Likewise, the World Health Organization has stated that legal gender recognition is an important matter of health.<sup>97</sup> Depriving transgender persons of legal gender recognition can harm some transgender persons’ health, implicating the human right to health.<sup>98</sup>

All the above-referenced considerations are closely related to the principle of human dignity. Justice Radhakrishnan’s opinion in *NALSA* and the Inter-American Court of Human Rights’ advisory opinion both viewed depriving persons of legal gender recognition as an affront to human dignity.<sup>99</sup> The Supreme Court’s judgment in *Pant* acknowledged that depriving third-gender persons of legal gender recognition violated the protection of human dignity in Article 12(1) of the Interim Constitution.<sup>100</sup> By the same logic, depriving binary transgender persons of legal gender recognition violates Article 16(1) of the 2015 Constitution.

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*Transgender, and Gender Nonconforming People, Version 8*, 23 INT’L J. TRANSGENDER HEALTH S1, S6 (2022); see also Jens T. Theilen, *Depathologisation of Transgenderism and International Human Rights Law*, 14 HUM. RTS. L. REV. 327 (2016).

<sup>95</sup> The World Professional Association for Transgender Health (WPATH) defines gender dysphoria as “a state of distress or discomfort that may be experienced because a person’s gender identity differs from that which is physically and/or socially attributed to their sex assigned at birth.” WPATH, *supra* note 94, at S252.

<sup>96</sup> Lau, *Gender Recognition as a Human Right*, *supra* note 7, at 198 (quoting AM. PSYCHIATRIC ASS’N (APA), GENDER DYSPHORIA 1–2 (2013) (emphasis added)).

<sup>97</sup> WHO/Europe Brief – *Transgender Health in the Context of ICD-11*, WORLD HEALTH ORG., <https://www.euro.who.int/en/health-topics/health-determinants/gender/gender-definitions/whoeurope-brief-transgender-health-in-the-context-of-icd-11> [<https://perma.cc/QWS3-5TDR>] (last visited Jan. 9, 2022) (“Legal gender recognition, represented through documents reflecting a person’s gender identity, is important for protection, dignity and health.”).

<sup>98</sup> For elaboration on this point, see Lau, *Gender Recognition as a Human Right*, *supra* note 7, at 197–98. Cf. *NALSA*, 5 SCC 438, ¶ 64 (J. Radhakrishnan) (quoting language from *Doe v. Yunits et al.*, 2000 WL33162199 (Mass. Sup. Ct. 2000) that acknowledged the effect that gender expression can have on an individual’s health and well-being).

<sup>99</sup> See, e.g., *NALSA*, 5 SCC 438, ¶ 68 (J. Radhakrishnan) (“Recognition of one’s gender identity lies at the heart of the fundamental right to dignity.”); Advisory Opinion OC 24-17, *supra* note 61, at ¶ 90 (“this Court has indicated that the right to identity is closely related to human dignity, the right to privacy and the principle of personal autonomy (Articles 7 and 11 of the American Convention).”).

<sup>100</sup> *Pant v. Nepal*, *supra* note 13, at 284.

Finally, the human rights principle of proportionality supports the trajectory of law reform.<sup>101</sup> In certain situations, there may be a legitimate reason to identify and categorize people based on biological sex characteristics instead of self-identification. However, to the extent that the government does have an interest in categorizing individuals based on biological aspects of sex, it must do so in a way that adheres to the proportionality principle. This principle dictates that a government's restriction of a right is only justified if the restriction is proportionate to a legitimate governmental aim.<sup>102</sup> For example, the UN Human Rights Committee has stated: "Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right."<sup>103</sup>

Sports is an example of a situation in which biological sex characteristics may matter. A person's biological sex characteristics can sometimes influence their competitiveness in sports. Governmental agencies may thus have a legitimate interest in classifying people by biological sex characteristics for the purpose of certain athletic competitions. Yet depriving individuals of the ability to self-determine gender on passports, citizenship certificates, education certificates, and other identity documents is not a proportionate means for promoting the goals of sports. Organizers of athletic competitions can take into account athletes' sex characteristics when determining their competition eligibility without relying on the types of identity documents at issue.<sup>104</sup>

<sup>101</sup> See Lau, *Gender Recognition as a Human Right*, *supra* note 7, at 199–204; Ruth Rubio Marín & Stefano Osella, *La Autodeterminación de Género: Gender Critical Radfems a la Prueba de la Proporcionalidad*, IBERICONNECT (February 1, 2021), <https://www.ibericonnect.blog/2021/02/la-autodeterminacion-de-genero-gender-critical-radfems-a-la-prueba-de-la-proporcionalidad> [<https://perma.cc/NC2K-SHAR>].

<sup>102</sup> See Alec Stone Sweet & Jud Mathews, *Proportionality Analysis and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008–2009); Jonas Christoffersen, *Straight Human Rights Talk—Why Proportionality Does (Not) Matter*, 55 SCANDINAVIAN STUD. LAW 11 (2010).

<sup>103</sup> U.N. Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 26, 2004).

<sup>104</sup> For example, the International Olympic Committee recommends that the governing bodies of individual sports consider ten principles in determining transgender and intersex athlete's categorization for competition in sex-segregated sports. Meanwhile, World Athletics (the international governing body for sports such as track and field) determines athletes'

Another example of a legitimate governmental goal is public safety. Some commentators worry that individuals will change their gender markers for nefarious purposes. They fear, for example, that some men will change their legal gender to gain access to women-only spaces—such as sex-segregated restrooms—just to prey on women. Yet again, depriving people of gender self-determination on identity documents is not a proportionate response to concerns about public safety.<sup>105</sup> Various tools, including criminal punishments for assaults in sex-segregated spaces, are a more proportionate means for addressing public safety.<sup>106</sup> Moreover, empirical research suggests that the risk of people changing their gender markers to prey on women is quite low.<sup>107</sup> Applying the proportionality principle to public safety concerns, one should conclude that such concerns cannot justify policies that, as a default, deprive people of gender self-determination.

In sum, the global trajectory toward expanding transgender persons' right to legal gender recognition is firmly undergirded by numerous human rights principles: principles concerning autonomy, privacy (including decisional privacy, informational privacy, and bodily integrity), equality, non-discrimination, health, dignity, and proportionality. The global trajectory weighs heavily in favor of the Supreme Court of Nepal ruling that binary transgender persons have a right to legal gender recognition.

#### IV. THE WAY FORWARD

Together with Nepal's constitution and Nepal's international obligations, the trajectory of comparative law supports Ms. Kapali's case against the Government of Nepal. In our expert opinion report for Ms. Kapali's case, we respectfully urged the Supreme Court to protect binary transgender persons' right to legal gender recognition, enabling them to obtain identity documents that reflect their self-identification as a man or

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eligibility for women's competitions based on their testosterone levels. *See* Joanna Harper, *Transgender Athletes and International Sports Policy*, 85 LAW & CONTEMP. PROBS. 151 (2022).

<sup>105</sup> Marín & Osella, *supra* note 81.

<sup>106</sup> Criminal prohibitions on assault are a means for safeguarding public safety that is less restrictive of rights. Evaluating whether there are "less restrictive means" to achieving legitimate interests is a common part of proportionality analysis. *See, e.g.,* Eva Brems & Laurens Lavrysen, 'Don't Use a Sledgehammer to Crack a Nut': *Less Restrictive Means in the Case Law of the European Court of Human Rights*, 15 HUM. RTS. L. REV. 139 (2015).

<sup>107</sup> *See* Alex Sharpe, *Will Gender Self-Declaration Undermine Women's Rights and Lead to an Increase in Harms?*, 83 MOD. L. REV. 505, 544–45 (2020); Peter Dunne, *(Trans)forming Single Gender Services and Communal Accommodations*, 26 SOC. & LEGAL STUD. 537, 547–55 (2017).



woman as opposed to assigning them automatically to a third gender category. To the extent that ordinary legislation and government policies bar binary transgender persons from obtaining identity documents that reflect their self-identification as a man or woman, they should be declared unconstitutional, and the Court should order remedial action. In sum, we submit that the Court should reach this conclusion for the following three reasons.

First, the Supreme Court's 2007 decision in *Pant* acknowledged that a person's legal gender should be based on self-determination as opposed to medical or other criteria.<sup>108</sup> The opinion in *Pant* focused on third-gender individuals, but its reasoning applies with equal force to the self-determination of binary transgender persons. The *Pant* decision is now reinforced by Nepal's 2015 Constitution, specifically its protection of liberty in Article 16(1), its protection of human dignity in Article 17(1), and its explicit protection of gender and sexual minorities in Articles 18(3) and 42(1).

Second, the Court should consider legal gender recognition from a comparative perspective, especially in the South Asian context.<sup>109</sup> State actors in both India and Pakistan have recognized the region's long history of gender diversity and have pioneered protections of self-identification in terms of legal gender.<sup>110</sup> Along with the Supreme Court of Nepal's decision in *Pant*, legal developments across South Asia have positioned the region as a global leader in the advancement of gender identity rights. South Asian jurisdictions have drawn on local social histories, transnational constitutional norms, and international standards to dismantle practices that restrict gender self-identification.<sup>111</sup> These changes in South Asia align with the trajectory of change around the world, and this trajectory is anchored in compelling human rights principles.<sup>112</sup> This trajectory weighs in favor of respecting binary transgender persons' right to legal gender recognition.

Third, we invite the Court to apply relevant international human rights standards concerning legal gender recognition. The instant case should be

<sup>108</sup> *Pant v. Nepal*, *supra* note 13, at 280, 285.

<sup>109</sup> As discussed in *supra* note 29, the Supreme Court of Nepal has a noteworthy record of citing international and foreign law as persuasive authority.

<sup>110</sup> See *supra* Part II.A.

<sup>111</sup> See *supra* note 43 and accompanying text; see also Lau, *Courts, the Law, and LGBT Rights in Asia*, *supra* note 7 (discussing ways in which the decisions in *Pant v. Nepal* and *NALSA v. Union of India* were informed by local cultural traditions and international and comparative law).

<sup>112</sup> See *supra* Parts II–III.



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decided in accordance with Nepal’s international legal obligations as illustrated above.<sup>113</sup>

### CONCLUSION

Nepal was a world leader when it ruled in *Pant v. Nepal* that people have the right to change their gender on identity documents based on “self-feelings” and “self-determination” as opposed to medical or other criteria. The pending case of *Kapali v. Nepal* gives the Supreme Court the opportunity to clarify that the self-determination principle in *Pant* applies not only to third-gender persons but also binary transgender persons. Indeed, the case of *Kapali* will shape the legacy of *Pant*. This Article has sought to demonstrate that the trajectory of comparative law—together with Nepal’s constitutional law and international obligations—supports binary transgender persons’ right to legal gender recognition based on self-determination.

While Ms. Kapali’s case in Nepal was the impetus for this article’s comparative analysis, our findings are applicable beyond Nepal. The trajectory of comparative law provides normative support for advancing self-determination of gender on identity documents. This trajectory is strongly anchored in human rights principles concerning autonomy, privacy (including decisional privacy, informational privacy, and bodily integrity), equality, non-discrimination, health, dignity, and proportionality. This trajectory ought to serve as inspiration for other jurisdictions around the world that are considering reform to laws and policies concerning gender identification.

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<sup>113</sup> See *supra* notes 76–77, 84, 90 and accompanying text.